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EXAMINER

MARKS, CHRISTINA M

ART UNIT

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3713

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Please find below and/or attached an Office communication concerning this application or proceeding.

YK

<b>Offic Action Summary</b>	Application N .	Applicant(s)
	09/975,099	GOWAN ET AL.
	Examiner C. Marks	Art Unit 3713

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 09 October 2001.

2a) This action is FINAL.                  2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-56 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-56 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

#### Priority under 35 U.S.C. §§ 119 and 120

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

- Certified copies of the priority documents have been received.
- Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
- Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

#### Attachment(s)

1) Notice of References Cited (PTO-892)                  4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_ .

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)                  5) Notice of Informal Patent Application (PTO-152)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.                  6) Other: \_\_\_\_\_ .

## **DETAILED ACTION**

### ***Information Disclosure Statement***

The listing of references in the specification is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609 A(1) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

### ***Claim Objections***

Claims 2-8 objected to because of the following informalities: In claim 2 and thus those that depend therefrom, there is insufficient antecedent basis for "said ball" in line 3. Appropriate correction is required.

Claims 45-55 are objected to for not being the proper form for an dependent claim. As written, the claims are conceivable as both an independent or dependent claim. For examination purposes, it is assumed the claims are that of the dependent form. However, the claims need to be put in correct form for dependent claims. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-5, 34-35 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Rooks (US Patent No. 5,221,081).

Rooks disclose a vertical ball tossing apparatus with a support frame (FIG 2, reference 11) and a plurality of launch devices (FIG 2, reference 12, 13, 14) arranged in a two-dimensional array. The balls are launched according to a launch sequence that is determined randomly (Column 1, lines 8-11). The device includes a biasing member in the form of a spring for projecting the ball from the device (FIG 3, reference 22) and a release device for retaining the spring member in a loaded position and for releasing the spring member to project the ball (FIG 3, reference 27). Likewise, the launch device comprises a coil spring disposed within a cylinder (FIG 3).

The balls are loaded by the user into a plurality of loaded positions, wherein the spring rod determines the loaded position to correspond to a different launch height (Column 4, lines 11-15). The launch device also includes a carrier device coupled to the spring (FIG 3). Rooks further states that by the rotation of the adjuster cup about the threaded support boss, adjustable deflection and deformation of the suction cup is permitted in order to alter its adhering ability. By doing this, the release of the springs can be at adjustable time intervals subsequent to securing the cup (Column 4, lines 50-60). Thus, by using the method disclosed by Rooks and rotating each suction cup in sequential order, Rooks provides a means for sequentially activating the launch devices.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 6, 7, 11-12, 14-18, 45 and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rooks (US Patent No. 5,221,081).

What Rooks discloses has been discussed above and is incorporated herein.

Rooks discloses a plurality of engaging structures adapted to engage the release device to facilitate multiple loaded positions of the carrier (Column 2, lines 66-68; Column 3, lines 1-16).

Rooks does not disclose that this engaging structure is connected to the carrier. However, it would have been obvious to one of ordinary skill in the art as a design choice to integrate the two pieces together to have the engaging surface be integrated with the carrier. One would be motivated to do choose this design choice in order to create a sturdier device for the carrier, as it would be integrated within the entire spring instead of just the top portion.

Furthermore, Rooks does not disclose a handle coupled to the apparatus nor that the apparatus is recessed in the floor of a permanent structure.

It would have been obvious to one of ordinary skill in the art to add a handle to the device of Rooks as the device is axiomatically portable. One of ordinary skill in the art would be motivated to incorporate a handle into the device of Rooks in order to provide the user with a means to easily carry the device in order to be able to practice in a plurality of places. Further, it would have been obvious to one of ordinary skill in the art to allow for the device to be recessed into the floor in order if desired by the user. One of ordinary skill in the art would be motivated to this as to provide a sturdier device as the device would not be susceptible to the wear and tear of moving it from one location to another.

Rooks discloses the device is adaptable to be placed on top of home plate (FIG 1). Though Rooks does not explicitly disclose that the support frame includes an indicia of home plate, it would have been obvious to one of ordinary skill in the art to incorporate such an indicia. One of ordinary skill in the art would be motivated to do so based upon the fact that the preferred embodiment is using the device over home plate and the fact that such an indicia would give the users a feeling of batting at home plate when the device is being used in environments other than the preferred embodiment. Likewise, the device is movable over home plate in order to make the position of the home plate adjustable so one of ordinary skill in the art would be motivated to employ the same circumstances when using indicia of home plate as compared to the actual home plate.

Rooks does not disclose embodying the device within a top deck; however, such a design choice would have been obvious to one of ordinary skill in the art as it would have protected the

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launch devices from abuse by the user. It is well known in the art to provide housing to essential components and devices in order to protect them from users who are known to be somewhat abusive to devices. By encasing the devices within a top deck and a support frame, the functionality of the device would be preserved while at the same time, the risk of the launch devices being damaged from being exposed to the user would be eliminated. One of ordinary skill in the art would be motivated to encase these devices as it would provide a level of protection to them wherein they would not be at as high of a risk for damage by the batter accidentally stepping on them, running into them, or damaging them out of frustration, a flaw that is evident to one of ordinary skill in the art with the present design of Rooks.

Regarding claims 45 and 46, it is notoriously well known in the art that a method carried out manually can be carried out by an electronic device that is controlled by code embodied on a computer-readable medium and thus the automation of such a task would have been obvious to one of ordinary skill in the art. Thus, the automation of the method for launching the balls in accordance with a sequence and height would have been obvious over the disclosure of Rooks.

Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rooks (US Patent No. 5,221,081) in view of Ciluffo et al. (US Patent No. 5,857,451).

Rooks discloses a plate member serving as a carrier that is used in the launch device that is embodied inside a cup for holding the balls prior to launch. Rooks does not disclose the cup has conical interior surface for holding balls of varying diameters or that the cup comprises a plurality of stepped rings.

Ciluffo et al. teaches that it is desirable in a throwing device that the device not be limited to one sport (Column 1, lines 49-51). Ciluffo et al. teaches of a device that can throw objects such as baseballs, softballs, tennis balls, squash balls, handballs as well as disc objects like clay pigeons and hockey pucks in a single apparatus by allowing for conversion (Column 1, lines 60-67; Column 2, lines 1-2).

It would have been obvious to one of ordinary skill in the art at the time of invention to use the teachings of Ciluffo et al. to adapt the Rooks device to accept objects from more than one sport. This would indeed require the plate member disposed in a cup to be altered via a design choice that would accommodate the teachings of Ciluffo et al. The manner in which these teachings were realized would axiomatically be a design choice and absent a showing of criticality for the choice would be obvious to one skilled in the art. One would be motivated to make the incorporation of the Ciluffo et al. teachings to provide a device that would work not only for baseball but also for other sports as well thus allowing the user to train many sports with one device making the device more economical and functional to the user.

Claim 13 rejected under 35 U.S.C. 103(a) as being unpatentable over Rooks (US Patent No. 5,221,081) in view of Meade (US Patent No. 5,294,109).

What Rooks discloses has been discussed above and is incorporated herein.

Rooks does not disclose a ball storage apparatus defined within the device.

Meade discloses a ball tossing apparatus that tosses the ball vertically in the air. Meade also discloses a ball storage apparatus for holding balls for the device.

It would have been obvious to one of ordinary skill in the art to incorporate a ball holding mechanism into the device of Rooks when embodied as discussed above with a protective top. By adding a protective top, a number of open areas would be available and it would obvious to one of ordinary skill in the art as taught by Meade to provide ball storage. One would be motivated to do this in order to provide a place for the user to keep extra balls where they know where they will always be as well as in a convenient readily accessible location.

Claims 19-33, 36-44, and 47-55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rooks (US Patent No. 5,221,081) in view of Battersby et al. (US Patent No. 6,546,924).

What Rooks discloses has been discussed above and is incorporated herein.

Rooks discloses a system that launches balls into the air for the user to practice batting. Rooks discloses that the launch sequence can be controlled by the user based upon how a suction cup is attached to a surface and when. However, one of ordinary skill in the art would immediately recognize some issues that would arise from this design. First, two suction cups could go off at once and cause the player to become confused as to what to do. Likewise, a long delay may occur waiting for the suction cup to go off, thus causing an undue wait for the player.

Battersby et al. disclose a ball-throwing machine with a method for sequentially launching a plurality of balls that has an electrical control system that can be programmed to store a pitch sequence (Column 3, lines 55-57). The device axiomatically has a processor (FIG 10) and memory that stores code and data (Column 12, lines 28-30) for the actions that will be required to execute such a sequence. The device also has a memory in the form of using a smart

card that can store and retrieve previously input launch sequences from the user to avoid the user having to continuously re-enter them for launch execution (Column 13, lines 60-67; Column 14, lines 12-14). In this manner, the player can choose between a plurality of predefined launch sequences (Column 14, lines 15-19). The electronic control system can be used to program the type, speed and location of each pitch (Column 3, lines 56-57). Battersby et al. use a remote control device which serves as a user input device for receiving launch instructions generated remotely regarding a single launch from the user with a keypad to allow the user to input the sequence to be executed (FIG 11). The launch module used inside the throwing machine is responsive to the user input to execute one of a plurality of launch sequences (Column 3, lines 54-58). Alternatively, the throwing machine can be programmed to simulate a predetermined or a random launch sequence that would be axiomatically generated by a random sequence generator. The device allows predefined sequences to be used and allow the user to select between predefined and random sequences as well as inputting a launch sequence (Column 10, lines 58-67; Column 13, lines 61-65). The launch sequence is then received from the user and the launch module is responsive to each subsequent launch instruction to operate the launch of the next pitch type from the predetermined sequence of pitch types (Column 10, lines 63-67) or a user input subsequently representing a launch instruction (Column 10, lines 58-62).

It would have been obvious to one of ordinary skill in the art at the time of invention to incorporate an electronic control means as disclosed by Battersby et al. into the device of Rooks. Though Battersby et al. is directed at a pitch sequence, one of ordinary skill in the art would be motivated to apply these teachings to Rooks in order to provide a more advanced and user friendly pitching apparatus. Therefore, one would apply the teachings of Battersby et al. to

Rooks in order to use the electronic control to activate the launch sequence instead of using suction cups. One could use these teachings of a user inputting a sequence to be executed to sequentially activate each of the launch devices. One would be motivated to incorporate these teachings into Rooks in order to automate the Rooks device electronically in order to correct the design flaws discussed above. By incorporating an electronic program that is used to activate a single launch device to control the launch sequence, the player would not be presented with two balls at once or have to wait an unknown amount of time for the ball to launch. Through the teachings of automation of pitching devices as disclosed by Battersby et al., the device of Rooks which activates the launch devices could be automated to present the player with a variety of pitches from a variety of locations on the mat without the player having to endure the undue inconvenience of long delays between launches or the confusion of being presented with two launches at once.

Regarding claims 47-55, it is notoriously well known in the art that a method carried out manually can be carried out by an electronic device that is controlled by code embodied on a computer-readable medium and thus the automation of such a task would have been obvious to one of ordinary skill in the art. Thus, the automation of the method for launching the balls disclosed by Battersby et al. in accordance with launching a plurality of balls would have been obvious over the disclosure of Battersby et al.

### *Conclusion*

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

**US Patent No. 6,440,013:** Pitching machine with remote with the pitch sequence programmed in and can vary.

**US Patent No. 6,238,307:** Batting tee that discloses the optimal lines of contact in the batting zone and allows the tee to be moved within these lines.

**US Patent No. 5,160,131:** Pneumatic batting device where the balls are launched vertically for the user to practice hitting.

**US Patent No. 2,705,003:** Device that will vertically project balls in the air for use in batting practice.

**US Patent No. 5,871,003:** Plurality of launches used to launch targets in the air for practice in shooting.

**US Patent No. 5,106,085:** Batting practice device that allows balls positioned at numerous heights to be swung at.

**US Patent No. 3,856,300:** Ball tossing device that allows a player to practice swinging at a ball that is pitched vertically from the ground.

**US Patent No. 5,800,288:** Spring mounted ball-tossing device for use by a player to hit a ball that is tossed vertically in the air.

**US Patent No. 4,865,318:** Ball tossing device that allows for a player to practice batting as the ball is tossed vertically into the air.

**US Patent No. 4,778,177:** Spring loaded arm mechanism is incorporated into a home player to toss a ball vertically in the air to allow the player to practice hitting.

**US Patent No. 4,834,375:** Plurality of ball hitting devices disposed on a home plate wherein an external control is used to indicate which batten tee will be used within each given time period.

**US Patent No. 6,305,366:** Pitching machine that employs two launch devices to allow the user to be pitched to from either device to improve batting performance.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. Marks whose telephone number is (703)-305-7497. The examiner can normally be reached on Monday - Friday (7:30AM - 4:00 PM).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, V. Martin-Wallace can be reached on (703)-308-1148. The fax phone numbers for the organization where this application or proceeding is assigned are (703)-872-9302 for regular communications and (703)-872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703)-308-1148.

*cmm*  
cmm  
May 2, 2003

*MICHAEL O'NEILL*

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PRIMARY EXAMINER